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No. NA 00-72-C-B/S

In The
Supreme Court of the United States
October Term, 2002

Charles Edward Sweeney, Jr.,
Petitioner

versus

Steve Carter,
Respondent

On Petition for a Writ of Certiorari
To the Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Circuit Court of Appeals erred in failing to issue a Certificate of Appealability on the issue of the denial of Petitioner's rights under the Fifth and Fourteenth Amendments following the state trial court's admission of Petitioner's June 30, 1992 statement, where the record demonstrates that law enforcement officers interrogated Petitioner in a custodial setting, regarding a homicide, without warning Petitioner that he had a right to remain silent and that any statement he made would be used against him.

2. The Circuit Court of Appeals erred in failing to issue a Certificate of Appealability on the issue of the denial of Petitioner's rights under the Fifth and Fourteenth Amendments following the prejudicial introduction of evidence of, and derived from, Petitioner's June 30, 1992 statement, where the record demonstrates that Petitioner's June 30, 1992 statement was involuntary and therefore inadmissible for any purpose.

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OPINION BELOW

The opinion of the United States District Court for the Southern District of Indiana, New Albany division, dated February 27, 2002, which ordered the Petitioner take nothing by his petition for writ of habeas corpus and the action dismissed with prejudice, is set forth in the appendix to this petition at page 1.

The opinion of the United States District Court for the Southern District of Indiana, following Petitioner's Motion for Reconsideration of the order dated February 27, 2002, dated April 4, 2002, and denying Petitioner's motion, and is set forth in the appendix to this petition at page 22.

The opinion of the United States Court of Appeals for the Seventh Circuit dated August 30, 2002, which denies a certificate of appealability regarding two of three issues, is set forth in the appendix to this petition at page 24.

The opinion of the United States Court of Appeals for the Seventh Circuit, following Petitioner's Motion for Reconsideration of the August 30, 2002 order, dated October 3, 2002, denying the Motion for Reconsideration and denying the Petitioner's request to hold his motion for reconsideration in abeyance, is set forth in the appendix to this petition at page 26.

JURISDICTION OF THIS COURT

The opinion of the United States Court of Appeals for the Seventh Circuit was entered on August 30, 2002. [Opinion, Appendix, p. 24] This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. §1254, *Hohn vs.*

United States, 524 U.S. 236, 118 S. Ct. 1969, 1970 (1998) holding that this Court has jurisdiction under §1254 (1) to review denials of applications for Certificates of Appealibility by a Circuit Judge or a Court of Appeals panel.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall... be compelled in any criminal case to be a witness against himself.

STATEMENT OF THE CASE

In a jury trial held in November, 1995, Petitioner Charles E. Sweeney, Jr. was convicted of murder. [Judgment of Conviction, T.R. 486] The trial court imposed a sentence of sixty years imprisonment. [Sentencing Order, T.R. 487-489]

On March 30, 1994, Petitioner Sweeney had been charged in Clark Circuit Court, Indiana with the crime of murder, more specifically, that "on the 28th day of May, 1991, at the County of Clark, in the State of Indiana: Charles Edward Sweeney, Jr. did knowingly or intentionally kill Daniel D. Guthrie by shooting him with a 9mm semi-automatic handgun." [Information, sworn to by William C. Grimes, Chief Deputy Prosecuting Attorney, 4th Judicial Circuit, 10C01-9403-CF-051, March 30, 1994; T.R. 13]

The underlying Probable Cause Affidavit, sworn to by Detective Lieutenant Harold D. Kramer on March 30,

1994, demonstrated that the murder charge against Sweeney was based exclusively on a statement given by Sweeney at the Marion County Detention Center in Indianapolis on June 30, 1992, and evidence derived from that statement. [T.R. 14-15]

The substance of the Probable Cause Affidavit regarding the murder charge was based on Sweeney's June 30, 1992, statement, including "the location of the body of Daniel Guthrie," Sweeney's "map of the area specific to the details of Guthrie's original and final location," Sweeney's disposition of items belonging to Guthrie, such as "sunglasses, a shoe and a medicine bottle," Sweeney's disposition of a "9mm spent shell casing"; and evidence derived from Sweeney's June 30, 1992, statement, including the recovered "remains of Daniel Guthrie," the "positive identification of Daniel D. Guthrie, the "retrieval of a bullet that had caused his death," and confirmation "that the bullet that killed Daniel Guthrie had been fired from the same Sig Sauer 9mm Model P226 Pistol belonging to CHARLES EDWARD SWEENEY, JR." [Probable Cause Affidavit, *supra*, p. 15]

Williams C. Grimes, Chief Deputy Prosecuting Attorney, 4th Judicial Circuit, who swore to the Information charging murder, characterized the crucial significance of Sweeney's June 30, 1992, statement to the murder prosecution:

> Mr. Grimes: I would advise the Court that we have previously stated that without the statement we probably could not proceed. [Hearing on Motions, November 10, 1994, hereinafter T.H., p. 96; T.R. 596]

Following the filing of the Information, the defense filed motions to suppress Sweeney's June 30, 1992, statement.

On August 26, 1994, the defense filed a Motion to Dismiss Information, on the grounds that the Information was based on Sweeney's June 30, 1992, statement which had not been voluntarily obtained. [Motion to Dismiss Information, August 26, 1994; T.R. 32-33]

In a Memorandum in Support of Motion to Dismiss, the defense advised that the murder prosecution was "based exclusively" on Sweeney's June 30, 1992, statement and evidence derived from that statement. [Memorandum in Support of Motion to Dismiss, September 29, 1994, p. 2; T.R. 74]

On November 1, 1994, the defense filed a Motion to Suppress: Statement, on the grounds that Sweeney's June 30, 1992, statement was not voluntary. [Motion to Suppress: Statement, November 1, 1994; T.R. 114-116]

Following evidentiary hearings regarding the defense motions to dismiss and to suppress Sweeney's June 30, 1992, statement, the trial court denied the defense motions. [T.R. 731, 767] A jury trial was held and, on November 21, 1995, the jury returned a verdict of "Guilty of Murder as charged in Count I of the information." [Verdict, November 21, 1995; T.R. 442] Judgment of Conviction was entered on November 21, 1995. [Judgment of Conviction, November 21, 1995; T.R. 443] Sweeney was sentenced to serve "a fixed term of 40 years with 20 years added for aggravating circumstances" imprisonment on the murder conviction. [Sentencing Order, December 20, 1995, p. 1 ; T.R. 487- 489; Sentencing Hearing, T.R. 1800]

On appeal, the Indiana Supreme Court stated, "Defendant raises the following claims on appeal: ... (3) The trial court erred in refusing to suppress Defendant's pre-trial statements." *Sweeney v. State*, Ind., 704 N.E.2d 86, 93, (1998), *certiorari denied*, 527 U.S. 1035 (1999). The Indiana Supreme Court affirmed the trial court's ruling in all respects, *Sweeney v. State*, 704 N.E.2d at 91, and a Petition under 28 U.S.C. §2254 for Writ of Habeas Corpus was filed with the United States District Court for the Southern District of Indiana. [1]

EVIDENTIARY HEARING

At evidentiary hearings regarding defense motions to dismiss and to suppress Sweeney's June 30, 1992, statement and evidence derived from the June 30, 1992, statement, conducted on November 10, 1994, and November 22, 1994, evidence was presented to demonstrate Sweeney's June 30, 1992, statement was not voluntary.

At the time of Sweeney's June 30, 1992, statement, Sweeney was represented by counsel Michael McDaniel and Edwin Sedwick. [Transcript of Hearing, November 10, 1994, hereinafter T.H., p. 101; T.R. 601; Sedwick Deposition,

[1] The United States District Court denied Sweeney's Petition for Writ of Habeas Corpus by its order dated February 27, 2002 [Appendix at p.1] and denied Sweeney's Motion for Reconsideration by its Order of April 4, 2002 [Appendix at p.22]. Sweeney filed a Notice of Appeal from the denial of his petition under 28 U.S.C. §2254 with the United States Court of Appeals for the Seventh Circuit, which Court granted a Certificate of Appealability on the issue of whether Sweeney's counsel provided ineffective assistance when erroneously advising him that he had "use immunity" and that he should cooperate with the government and give a complete statement regarding the murder of Daniel Guthrie. [Appendix at p. 24] That matter is presently pending before the United States Court of Appeals for the Seventh Circuit under cause number NA 00-72-CB/S.

November 7, 1994, hereinafter Deposition, p. 6; read into the record of November 10, 1994, hearing, T.H. 168; T.R. 668] McDaniel testified at the evidentiary hearing that, pursuant to a plea agreement on a separate charge with federal prosecutors, Sweeney would disclose the location of Dan Guthrie's body. [T.H. 105; T.R. 605] McDaniel testified he negotiated a use immunity agreement on behalf of Sweeney with the Indiana Prosecutor regarding any statements by Sweeney "on the issue of the Guthrie homicide". [T.H. 106, 107, 108; T.R. 606, 607, 608]

The Indiana Prosecutor subsequently testified that the use immunity negotiations did not result in a use immunity agreement regarding the homicide of Danny Guthrie. [T.H. 170, 171; T.R. 671, 672] McDaniel, as Sweeney's counsel, was convinced the prosecutor had agreed to use immunity and advised Sweeney the use immunity agreement was in place. [T.H. 111-112; T.R. 611-612] However, Sweeney's counsel failed to follow Indiana statutes regarding the securing of use immunity. Nothing was reduced to writing, no request was made by the prosecutor asking for an order of use immunity from the court and no approval of a use immunity agreement was obtained from the trial court. See Indiana Code §35-37-3-3. At the time the statement was given, Sweeney was in custody; and yet, as a result of the representations of his counsel that a use immunity agreement had been entered into, Sweeney, in the presence of his counsel, made the incriminating statement of June 30, 1992, to Federal and State law enforcement authorities. McDaniel testified, "No advice of rights was given. No waiver was asked for from Mr. Sweeney." [T.H. 112; T.R. 612] "[T]here was no advice of rights, no waiver of rights." [T.H. 113; T.R. 613].

McDaniel testified unequivocally that he advised Sweeney the use immunity agreement was "carved in stone", so that Sweeney should "give as complete of a statement as possible." [T.H. 128; T.R. 628] At trial, McDaniel testified that he advised Sweeney to "tell everything" in the June 30, 1992, statement. [T.R. 1672-1673] McDaniel testified that Sweeney understood that when "you have an agreement of use immunity, that what you say cannot be used against you." [T.H. 163-164; T.R. 663-664]

Sweeney's other counsel, Edwin Sedwick, testified by deposition taken on November 7, 1994, which was read into the record at page 168 [T.H. 168; T.R. 668] of the November 10, 1994, evidentiary hearing. Sedwick testified that the terms of the use immunity agreement were communicated to Sweeney, [Deposition, pp. 13-14] and that he would never have advised Sweeney to give a statement in the absence of "a firm agreement with regard to use immunity." [Deposition, pp.16-17] Sedwick testified Sweeney was never advised that his statement could be used against him. [Deposition, p. 11] Sedwick testified that Detective Kramer, representing the State of Indiana, affirmed at the time of Sweeney's statement that the use immunity agreement was in place, [Deposition, p. 12], and that Chuck Sweeney believed he "was being afforded use immunity" before he gave his June 30, 1992, statement regarding Daniel Guthrie. [Deposition, p. 26] Thus, both attorneys representing Sweeney advised him to make a complete statement because he had use immunity and his statements regarding Daniel Guthrie could not, therefore, be used against him.

At the evidentiary hearing, a federal postal inspector, Vance Arnold, testified that he served as "a representative of the Clark County Police Department" to interrogate Sweeney with respect to other information that Mr. Sweeney

was going to provide, including the location of the body of Daniel Guthrie." [T.H. 187; T.R. 688] McDaniel testified that postal inspector Vance Arnold was present on behalf of Clark County, Indiana, prosecutorial authorities [T.H. 111; T.R. 611] and that Kramer had prepared Arnold to interrogate Sweeney. [T.H. 193, 206; T.R. 694, 707] Detective Kramer testified that the state's representative, Vance Arnold, interrogated Sweeney regarding the whereabouts of Danny Guthrie's body [T.R. 1332] and at trial, defense counsel Edwin Sedwick testified that Arnold conducted the majority of the questions to Sweeney. [T.R. 1606] At trial, defense counsel Michael McDaniel testified that Arnold questioned Sweeney and asked Sweeney to make a map showing the area where Guthrie's body was located. [T.R. 1671-1672]

Arnold testified that he knew that Sweeney was suspected of murder, but that prior to interrogating Sweeney, he [Arnold] did not warn Sweeney that his statements could be used against him. [T.H. 195-196; T.R. 696-697] Arnold also testified no one else advised Sweeney his statement could be used against him that day. [T.H. 201; T.R. 702] In his trial testimony, Arnold confirmed that he had not informed Sweeney his June 30, 1992, statement could be used against him. [T.R. 1609]

Harold Kramer was a detective with the Clark County Sheriff's Office. [T.H. 202; T.R. 703] Kramer was Sweeney's arch antagonist. Kramer, unbeknownst to Sweeney, secretly observed Sweeney's June 30, 1992, statement via a closed circuit monitor. [T.H. 205; T.R. 706] Kramer testified no one was concerned about advising Sweeney that his statement could be used against him. [T.H. 212; T.R. 713]

Thus, evidence adduced at the November 10, 1994, evidentiary hearing demonstrated that Sweeney's lawyers advised him to make a complete statement because whatever he said could not be used against him, and that no representative of either the federal government or Indiana ever advised Sweeney that his statement could be used against him.

TRIAL COURT'S RULING

At the conclusion of the evidence presented at the November 10, 1994, evidentiary hearing, the trial court denied the defense motions to dismiss and suppress. [T.H. 230; T.R. 731]

At the conclusion of the evidence presented at the November 22, 1994, continuation of the evidentiary hearing, the trial court again denied the defense motion to suppress. [Transcript of Hearing, November 22, 1994, p. 266, T.R. 767]

The trial court ruled that the lawyers' advice to Sweeney to make a complete statement because whatever he said could not be used against him was a "misunderstanding, and I'm going to call it a misunderstanding." [T.H. 225; T.R. 726]

The trial court ruled that a *Miranda* warning that Sweeney's statement could be used against him would not apply.

> COURT: "I'm not going to apply *Miranda*... The whole purpose of *Miranda* is to make certain that the individual is fully aware of his constitutional rights." [T.H. 228; T.R. 729]

The trial court ruled Sweeney's June 20, 1992, statement was voluntary.

> COURT: "I'm convinced that your client knew his rights in and out, up and down, back and forward. I'm convinced that the State didn't offer use immunity." [T.H. 232; T.R. 733]

Thus, the trial court refused to uphold the *Miranda* safeguard and refused to grant Sweeney relief from his own counsel's advice that he make a complete statement because a use immunity agreement was in place, when, as determined by the trial Court, no use immunity agreement existed.

EVIDENCE AT TRIAL

Roger L. Duvall, Special Prosecuting Attorney, prosecuted the murder charge for the State of Indiana. [T.R. 838] Prior to trial, Duvall acknowledged the evidence at trial would be based on Sweeney's June 30, 1992, statement. [T.R. 848-849]

The state's principal witness was Harold Kramer, a detective with the Clark County Sheriff's Office. [T.R. 1246] Kramer had, unbeknownst to Sweeney, observed Sweeney's June 30, 1992, statement from a separate room via "closed circuit television." [T.R. 1267-1268] At trial, the prosecutor asked Kramer to testify about the content of Sweeney's statement. Over defense counsel's objection, Kramer recounted the content of that statement. [T.R. 1268-1280] His testimony included such details as the fact that Sweeney and Guthrie had been together on May 28, 1991, [T.R. 1268-1271], that Sweeney had found Guthrie's body already dead with a

bullet hole in Guthrie's head [T.R. 1275-1276], that the 9 millimeter handgun lying nearby was Sweeney's [T.R. 1276], and that Sweeney dragged Guthrie's body to another location and buried it and the handgun. [T.R. 1277-1278]

Kramer further testified that Sweeney provided, as part of his June 30, 1992, statement, a map showing where Guthrie's body was located. [T. R. 1279] Kramer further testified that, based on the information Sweeney provided, law enforcement officials searched for and found Guthrie's body. [T.R. 1279, 1280, 1312-1313, 1314].

Kramer testified that Sweeney stated he had taken Guthrie's fishing equipment and placed it near the rear door of Guthrie's residence. Kramer also testified that Sweeney stated his belief that Danny Guthrie was working for the police.

Kramer's extensive testimony recounting the content of Sweeney's June 30, 1992, statement presented the substance of the state's entire murder case against Sweeney. The remainder of Kramer's testimony and the testimony and evidence presented through other witnesses filled in the details of derivative evidence, but Kramer's extensive testimony recounting the content of Sweeney's statement undeniably demonstrated the state's prosecution was based on and derived from Sweeney's June 30, 1992, statement.

Vance Arnold, the federal postal inspector who questioned Sweeney on behalf of the State of Indiana on June 30, 1992, likewise testified extensively regarding the content of Sweeney's June 30, 1992, statement. [T.R. 1594, 1595, 1600-1605] Arnold testified Sweeney stated he and Guthrie had gone fishing on May 28, 1991, that Sweeney stated he found Guthrie's body, that Sweeney stated he

found the 9 millimeter handgun, that Sweeney stated he disposed of items associated with Guthrie and that Sweeney stated he buried Guthrie's body. Arnold further testified Sweeney drew two maps showing the location of Danny Guthrie's body, as part of Sweeney's June 30, 1992, statement, and that he was present when the body of Danny Guthrie was found where Sweeney had stated it would be.

Arnold's testimony recounting the content of Sweeney's June 30, 1992, statement, reinforced Kramer's testimony and established the substance of the state's entire murder case against Sweeney. The testimony and evidence presented through other witnesses filled in coincidental details or derivative evidence, but Kramer's and Arnold's extensive testimony about Sweeney's statement undeniably demonstrated the fact that the state's prosecution was based on and derived from Sweeney's June 30, 1992, statement.

Based on the extensive evidence from Sweeney's own statements and evidence derived from those statements, such as the testimony of a medical examiner who conducted an autopsy of the body of Danny Guthrie, located as a direct result of Sweeney's June 30, 1992, statement [Handy Testimony, T. R. 1354-1402], the jury returned a verdict of guilty of murder. [Verdict, T.R. 442].

REASONS FOR GRANTING THE WRIT

I.

The Circuit Court of Appeals erred in failing to issue a Certificate of Appealability on the issue of the denial of Petitioner's rights under the Fifth and Fourteenth Amendments following the state trial court's admission of Petitioner's June 30, 1992 statement, where the record

demonstrates that law enforcement officers interrogated Petitioner in a custodial setting, regarding a homicide, without warning Petitioner that he had a right to remain silent and that any statement he made would be used against him.

Petitioner Sweeney has brought a habeas corpus petition pursuant to 28 U.S.C. § 2254. Such petition is subject to the limiting provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA). *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059 (1997). Under AEDPA, a petitioner must obtain a Certificate of Appealability ("COA") before he can appeal the district court's decision. 28 U.S.C. § 2253(c)(1). A COA will be granted only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In order to make a substantial showing, a petitioner must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595 (2000). In assessing whether the Petitioner has been denied a constitutional right, a reviewing court must defer to the state court's determination unless its decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)&(2); *Williams v. Taylor*, 529 U.S. 362, 404-405, 120 S. Ct. 1495 (2000). A decision is contrary to clearly established federal law if "the state court arrives at a conclusion opposite to that reached by the [Supreme Court] on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 412-413, 120 S.

Ct. 1495. An application of federal law is unreasonable if "the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413, 120 S. Ct. 1495.

The United States Supreme Court has held that the *Miranda* decision announced a constitutional rule that Congress may not supercede legislatively. *Dickerson v. United States*, 530 U.S. 428, 444, 120 S. Ct. 2326, 2336 (2000). The Court has further held *Miranda* issues are appropriately considered de novo in a 28 U.S.C. §2254 review. In *Thompson v. Keohane*, 516 U.S. 99, (1995), the Supreme Court stated:

> Claims that state courts have incorrectly decided *Miranda* issues, as *Withrow v. Williams*, 507 U.S. 680, 113 S. Ct. 1745 (1993), confirms, are appropriately considered in federal habeas review. *Thompson v. Keohane*, 516 U.S. at 107, n. 5.

The Fifth Amendment to the United States Constitution guarantees that, "No person... shall be compelled in any criminal case to be a witness against himself." The Fifth Amendment guarantee against self-incrimination applies to the states through the Fourteenth Amendment to the United States Constitution. *Malloy v Hogan*, 378 U.S. 1, 3 (1964).

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court stated the important function of the warning of the right to remain silent.

> The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. *Miranda v. Arizona*, 384 U.S. at 469.

On June 30, 1992, no prosecutor or officer warned Petitioner Sweeney that he had a right to remain silent or that any statement he might make regarding the Guthrie homicide could be used against him. [Sedwick Deposition, p. 11; T.R. 612]

In its opinion, *Sweeney v. State*, the Supreme Court of Indiana confirmed that Petitioner Sweeney was in federal custody and that he was not advised of his right to remain silent or that anything he said could be used against him. *Sweeney v. State*, 704 N.E.2d at 104. Specifically, the federal postal inspector Vance Arnold, serving as the "representative of the Clark County Police Department," who interrogated Petitioner Sweeney regarding "information that Mr. Sweeney was going to provide including the location of the body of Danny Guthrie" [T.H. 187; T.R. 688], did not warn Petitioner Sweeney that his statement could be used against him. [T.R. 1609] Arnold confirmed that nobody else warned Petitioner Sweeney that his statement could be used against him. [T.H. 201; T.R. 702] Further, Petitioner Sweeney's two lawyers did not warn him that his statement could be used against him. In fact,

Petitioner Sweeney's two lawyers advised him that this statement could not be used against him. [T.H. 128; T.R. 628, Deposition, p. 26] Thus, nobody warned Petitioner Sweeney that his June 30, 1992, statement could be used against him. The record reflects indisputable evidence that defendant was in federal custody and indeed was not advised of his *Miranda* rights.

The law clearly requires the warning against self-incrimination. In the present case, the state trial court failed to uphold Petitioner Sweeney's constitutional protection against self incrimination when it permitted the prosecution to use the improperly obtained statement. The trial court ruled that it would not apply *Miranda*.

> Court: I'm not going to apply *Miranda*... I know of no particular provisions in the Federal law or in State law that says you have to use those exact words before you're permitted to use an admission of a Defendant. The whole purpose of *Miranda* is to make certain that that individual is fully aware of his Constitutional Rights. [T.H. 228; T.R. 729]

Of course, the United States Supreme Court's *Miranda* decision holds that, "He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law." *Miranda v. Arizona*, 384 U.S. at 479. This Court has held that the giving of *Miranda* warnings is a threshold matter to the admissibility at trial of evidence obtained from a subsequent interrogation.

> Unless the prosecution can demonstrate the warnings and waiver as threshold matters...it may not overcome the objection to the use at trial of statements obtained from the person in any ensuing custodial interrogation. *Withrow v. Williams*, 507 U.S. at 690, 113 S. Ct. at 1752.

The whole purpose of *Miranda* was defeated with regard to Petitioner Sweeney's June 30, 1992, statement where no one, neither prosecutor, nor officer, nor defense attorney warned Petitioner Sweeney that anything he said could be used against him. The required warning against self-incrimination is a pre-requisite "to the admissibility of any statement made by a defendant." *Miranda v. Arizona*, 384 U.S. at 477.

> He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law. ... [U]nless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him. *Miranda v. Arizona*, 384 U.S. at 479.

This Court has observed that the supporters of *Miranda v. Arizona* view the rigid requirement of the giving of the *Miranda* warnings as the strength of the decision. *Fare vs. Michael C.*, 439 U.S. 1310, 1314, 99 S. Ct. 3, 5 (1978).

> It afforded police and courts clear guidance on the manner in which to conduct a

> custodial interrogation: if it was rigid, it was also precise. *Id.*

This Court has observed that in the time since the *Miranda* decision was handed down,

> Law enforcement has grown in constitutional as well as technological sophistication, and there is little reason to believe that the police today are unable... to satisfy *Miranda*'s requirements. *Withrow v. Williams*, 507 U.S. at 695, 113 S. Ct. at 1755.

Other jurists have observed that the giving of *Miranda* warnings and the determination of voluntariness of statements given during custodial interrogation go hand in hand.

> The purpose of requiring *Miranda* warnings is (1) to protect captive suspects by insuring that police do not coerce or trick a suspect to confess against his will, and (2) to lessen the burden on courts of determining, after the fact, whether particular confessions were voluntary. *U.S. v. Chrisman*, 209 F.Supp.2d 659, 666 (W.D. Tex. 2002), citing *Berkemer v. McCarty*, 468 U.S. 420, 433, 104 S. Ct. 3138, 3146-3147 (1984).

> To be admissible, a confession must be voluntary and, if given by one in custody, must have been proceeded by the advice and warnings set out in *Miranda*. *Huckelbury v. Wainwright*, 781 F.2d 1544, 1545 (11th Cir. 1986).

PREJUDICE

Petitioner Sweeney's June 30, 1992, statement was used extensively and with devastating effect by the Clark County, Indiana, prosecuting authorities. Petitioner Sweeney's statement formed the basis for the murder charge itself, and formed the basis for extensive prosecution testimony presented at trial. Kramer's extensive testimony recounting the content of Petitioner Sweeney's June 30, 1992, statement presented the outline and substance of the state's entire murder case against Petitioner Sweeney. The remainder of Kramer's testimony and the testimony and evidence presented through other witnesses filled in the details of derivative evidence, but Kramer's testimony of the content of Petitioner Sweeney's statement demonstrated without a doubt that the state's prosecution was based on and derived from Petitioner Sweeney's June 30, 1992, statement.

Vance Arnold's testimony recounting the content of the same June 30, 1992, statement, coupled with Kramer's testimony recounting the content of that statement, presented the outline and substance of the state's murder case against Petitioner Sweeney. The testimony and evidence presented through other witnesses filled in coincidental details or derivative evidence, but Arnold's extensive testimony, in addition to that of Kramer, clearly demonstrated the fact that the state's prosecution was based on and derived from Petitioner Sweeney's June 30, 1992, statement.

Further, the state trial court's failure to uphold Petitioner Sweeney's constitutional protection against self incrimination had a substantial effect on the jury's verdict,

especially in view of the introduction of the extensive content of Petitioner Sweeney's statement, together with the introduction of extensive autopsy and ballistics evidence which would never have been developed absent Petitioner Sweeney's statement regarding the location of Danny Guthrie's body and the bullet found therein. Had it not been for Petitioner Sweeney's statement, there would have been no murder charge. And had it not been for Petitioner Sweeney's statement, he would not have been convicted.

II.

The Circuit Court of Appeals erred in failing to issue a Certificate of Appealability on the issue of the denial of Petitioner's rights under the Fifth and Fourteenth Amendments following the prejudicial introduction of evidence of, and derived from, Petitioner's June 30, 1992, statement, where the record demonstrates that Petitioner's June 30, 1992, statement was involuntary and therefore inadmissible for any purpose.

> A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt.... [B]ut a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape... that no credit ought to be given to it; and therefore, it is rejected. *King v. Warickshall*, 1 Leach 262, 263-264, 168 Eng.Rep. 234, 235 (K. B. 1783).

The United States Supreme Court has held voluntariness of statements issues appropriate for 28 U.S.C.

§2254 de novo consideration. In *Miller v. Fenton*, 474 U.S. 104 (1985), the Supreme Court stated as follows.

Without exception, the Court's confession cases hold that the ultimate issues of "voluntariness" is a legal question requiring independent federal determination. ...[T]he ultimate questions whether, under the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination. *Miller v. Fenton*, 474 U.S. at 110, 112.

In *Arizona v. Fulminante*, 499 U.S. 279 (1991), the Supreme Court stated as follows.

> We normally give great deference to the factual findings of the state court. [Citations omitted.] Nevertheless, the ultimate issue of "voluntariness" is a legal question requiring independent federal determination. *Arizona v. Fulminante*, 499 U.S. at 287.

The Fifth Amendment to the United States Constitution guarantees that, " No person... shall be compelled in any criminal case to be a witness against himself." The Fifth and Fourteenth Amendments further guarantee "due process of law" in criminal proceedings. The Fifth Amendment guarantee against self-incrimination applies to the states through the Fourteenth Amendment to the United States Constitution. *Malloy v. Hogan*, 378 U.S. at 3 (1964).

As discussed above, in Reason For Granting the Writ I, Petitioner Sweeney's June 30, 1992, statement was

involuntary because no one warned him, even in the custodial setting, that his statement could be used against him. Without this warning, Petitioner Sweeney lacked the capability of any "real understanding and intelligent exercise" of his Fifth Amendment right to remain silent.

As also discussed above, in Reason For Granting the Writ I, Petitioner Sweeney's June 30, 1992, statement was involuntary because his defense attorneys assured him that a state use immunity agreement was in place, upon which he relied. In fact, no state use immunity agreement was in place. Case after case announces that assurances of immunity are so attractive that they render resulting confessions involuntary.

> A promise that statements made will not be used against the declarant... is a truly powerful one, going to the heart of a declarant's reservations about giving a statement. *U.S. v. Conley*, 859 F. Supp. 830, 836 (W.D. Pa. 1994).

> Similarly, certain promises, if not kept, are so attractive that they render a resulting confession involuntary. [Citation omitted.] A promise... that any statement will not be used against the accused is such a promise. *Streetman v. Lynaugh*, 812 F.2d 950, 957 (5th Cir. 1987).

> There are certain promises whose attraction renders a resulting confession involuntary if the promises are not kept, and the Defendant's perception of what government agents have promised is an important factor

in determining voluntariness. *U.S. v. Shears*, 762 F.2d 397, 402 (4th Cir. 1985).

> It is firmly established that self-incriminating statements induced by promises or offers of leniency shall be regarded as involuntary and shall not be admitted into evidence for any purpose. *U.S. v. Powe*, 591 F.2d 833, 836 (D.C. Cir. 1978).

Petitioner Sweeney was confronted with such an assurance of immunity, when he was advised that his June 30, 1992, statement regarding Danny Guthrie could not be used against him. The appeal of these assurances of immunity was not diminished by any *Miranda* warning whatsoever that Petitioner Sweeney's statement would, in fact, be used against him. The state officers, Harold Kramer secretly watching and listening from a separate room and Vance Arnold interrogating on behalf of the Clark County authorities, provided Petitioner Sweeney with no notice whatsoever that anything he said could and would be used against him. Under the circumstances, this failure to provide notice, and to obtain an understanding and intelligent waiver, devastated Petitioner Sweeney's Fifth Amendment protection against self-incrimination. As one Court has recently observed, "This entire discussion could probably have been avoided had the customs agents obtained a written *Miranda* waiver." *U.S. v. Garibay*, 143 F.3d 534, 539, (9th Cir. 1998).

In view of all of the circumstances set forth above, Petitioner Sweeney's June 30, 1992, statement regarding Danny Guthrie was clearly involuntary. In *Malloy v. Hogan*,

this Court announced the federal standard by which a state confession is deemed to be involuntary.

> [T]oday the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions... Under this test, the constitutional inquiry is... whether the confession was "free and voluntary; that is, it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." [Citations omitted.] In other words the person must not have been compelled to incriminate himself. *Malloy v. Hogan*, 378 U.S. at 7.

Accord, *Hutto vs. Ross*, 429 U.S. 28, 30 (1976).

Petitioner Sweeney's June 30, 1992, statement was involuntary under the *Malloy* standard. His statement was not "free and voluntary" because the interrogating authorities failed to warn him that his statement could be used against him. His statement was not "free and voluntary" because it was obtained by the unequivocal direct assurance of his defense attorneys that the state prosecuting authorities had promised that his statement could not be used against him. This totality of circumstances, including the complete failure of law enforcement authorities to warn that his statement could be used against him, coupled with the "improper influence of his defense attorney's incorrect assurances of immunity, all of which no reasonable man could resist, deprived Petitioner Sweeney of the knowing, intelligent exercise of his Fifth

Amendment protection against self-incrimination, rendering his statement involuntary.

PREJUDICE

The prejudice to Petitioner Sweeney as a result of this constitutional violation is the same as that set out at length on page 19, and the page that follows regarding Reason for Granting the Writ I. The Clark County, Indiana, prosecuting authorities used Petitioner Sweeney's June 30, 1992, statement as the outline and substance of their murder prosecution against him. Petitioner Sweeney's statement was also used to provide investigating authorities with the information necessary to discover derivative evidence which was used by the state to fill in the details of the murder prosecution, including autopsy and ballistics evidence. But for Petitioner Sweeney's statement, there would have been no murder charge and there would have been no conviction.

CONCLUSION

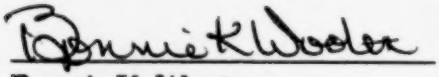
Following Petitioner's conviction and the affirming of that conviction by the Indiana Supreme Court, Petitioner Sweeney sought a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 from the United States District Court for the Southern District of Indiana. That Court denied his request and refused to issue a Certificate of Appealability ("COA"). On appeal of the denial of the COA to the Seventh Circuit Court of Appeals, the reviewing court issued a COA on only one issue, involving the ineffective assistance of Petitioner Sweeney's trial counsel. See, *supra*, page 5, n.1. The Court of Appeals, however, refused to issue a Certificate of Appealability on the two issues addressed in this petition, and in failing to do so, the Court committed error.

The Seventh Circuit Court of Appeals erred in failing to find that Petitioner had met his burden of

> showing that reasonable jurists could debate whether.... the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. at 484, 120 S. Ct. at 1604, quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, and n.4, 103 S. Ct. 3383 (1983).

In fact, Petitioner Sweeney has met his burden. He has demonstrated that *Miranda*, on which both of Petitioner's claims are based, is a constitutional decision. He has demonstrated that he was not provided with the required *Miranda* warnings before being interrogated and providing the state with a statement that was used as the substance of the state's murder prosecution against him. He has demonstrated that his statement was given, following a promise of immunity that did not exist. And he has demonstrated through citations to numerous United States Supreme Court and Federal Court cases that reasonable jurists could find that the District Court's assessment of the constitutional claims in this matter were wrong. The issues raised by Petitioner Sweeney are adequate to deserve the encouragement to proceed further, and for this and the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,



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Counsel of Record for Petitioner

Date: December 31, 2002
Greenfield, Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DISTRICT

CHARLES SWEENEY, JR.,	)
PETITIONER	)
	)
VS.	)NO. NA 00-72-C-B/S
	)
STEVE CARTER,	)
RESPONDENT	)

JUDGMENT

The court, having this day made its Entry,

IT IS THEREFORE ADJUDGED that the petitioner take nothing by his petition for a writ of habeas corpus and this action is **dismissed with prejudice**.

/s/ Sarah Evans Barker
SARAH EVANS BARKER
Judge, United States District Court

Date: February 27, 2002

Copies to:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

CHARLES SWEENEY, JR., PETITIONER	)	
VS.	)	NO. NA 00-72-C-B/S
STEVE CARTER, RESPONDENT[1]	)	

ENTRY DISCUSSING PETITION FOR WRIT OF HABEAS CORPUS

For the reasons explained in this Entry, the petition of Charles Sweeney, Jr. for a writ of habeas corpus must be **denied**.

I.

In the exercise of its *habeas* jurisdiction, a federal court may grant relief only if the petitioner shows that he is in custody "in violation of the Constitution or laws of the United States." 28 U.S.C. §2245(a). When a habeas petition is filed after enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) on April 24, 1996, that Act's restrictions on federal review of state court rulings apply to the case. *See Terry Williams v. Taylor*, 529 U.S. 362 120 S. Ct. 1495 (2000). Under the AEDPA, a federal court must deny a habeas petition on a claim adjudicated on the merits in state court unless the state court adjudication:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of,

clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)

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[1] The Current Indiana Attorney General, Steve Carter, named in his official capacity only, is **substituted** as the respondent pursuant to Rule 25(d) of the *Federal Rules of Civil Procedure*.

In *Williams*, the Court definitely interpreted the revised standards of review set out in § 2254(d), holding as follows:

> [Section] 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for writ of habeas corpus with respect to claims adjudicated on the merits in state court....Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "reasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decision but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 413, 120 S. Ct. at 1523. In addition, though

> [a] petitioner can also attack a state court's adjudication on the grounds that it is based 'on an unreasonable determination of the facts,' but such attacks are accompanied by a rigorous burden of proof: state court factual findings are presumed to be correct unless the petitioner rebuts the presumption with 'clear and convincing' evidence. [28 U.S.C.] §2254(e)(1)....

Sanchez v Gilmore, 189 F.3d, 619, 623 (7th Cir. 1999).

II.

A.

On March 30, 1994, an Information was filed in the Clark Circuit Court charging Sweeney with the May 28, 1991, murder of Daniel D. Guthrie. A probable cause affidavit was also filed on March 30, 1994, supporting the State of Indiana's request for the issuance of a warrant for Sweeney's arrest. That affidavit was executed by Det. Lt. Harold Kramer of the Clark County Sheriff's Department. The affidavit recited the following: (1) a missing person report had been filed by the wife of Daniel Guthrie on May 29, 1991; (2) Lt. Kramer was assigned to that investigation; (3) during the course of his investigation a pipe bomb was placed under Lt. Kramer's police vehicle; (3) Sweeney entered into a plea agreement with federal authorities on June 26, 1992, in connection with the pipe bomb incident; (4) on June 30, 1992, Sweeney advised federal authorities, among other things, that he had twice moved Guthrie's body and where Guthrie's body was then located; (5) Guthrie's body was thereafter found where Sweeney had indicated it was located; and (6) the cause of death of Daniel Guthrie was a single gunshot wound to the head. A warrant for Sweeney's arrest based on the foregoing as well as other information was issued on March 30, 1994. Sweeney was sentenced on the federal charges stemming from the pipe bomb incident on October 8, 1992. He was brought to Clark County from a federal facility in Kentucky and made his first court appearance in connection with the murder charge on August 17, 1994. At that time, Sweeney was appointed counsel and a trial date was set.

The information supplied by Sweeney during his interview with federal authorities on June 30, 1992, was

crucial to the commencement of the State's case and to each critical aspect of the prosecution thereafter.

Through his public defender, Sweeney filed a motion to suppress on October 28, 1994. This motion to suppress was directed, in part, to the statements made by Sweeney to federal authorities on June 30, 1992, and to evidence located as a result of statements made during the course of that interview. A hearing on the motion to suppress was held on November 10, 1994. The motion to suppress was denied, the trial court finding that:

- There was a misunderstanding between the State Prosecutor and Sweeney's federal defense team but there was no promise of or agreement to extend use immunity to Sweeney by the Prosecutor.

- Sweeney was sufficiently informed of his right not to give a statement by virtue of the fact that his defense counsel extensively discussed the concept of use immunity with him.

- Sweeney's reliance on Indiana Rule of Evidence 410 to preclude from evidence his statement was misplaced because there was no substantive alteration of Sweeney's plea in federal court, that is, the plea agreement was merely renegotiated to better achieve the parties' wishes rather than a withdrawal of the plea as contemplated by Rule 410;

- There was no deprivation of Sweeney's right to counsel.

On December 12, 1994, the Clark Circuit Court certified its ruling on Sweeney's motion to suppress, along with one other ruling, as appropriate for an interlocutory appeal. On February 1, 1995, the Indiana Court of Appeals refused to accept Sweeney's petition for interlocutory appeal.

Various other pretrial motions were filed in the trial court. Sweeney also sought federal habeas corpus relief pursuant to 28 U.S.C. §2241(c)(3) in a proceeding docketed as No. NA 95-197-C-B/H. This action was dismissed without prejudice on November 8, 1995. Sweeney also attempted to remove the state prosecution to federal court pursuant to 28 U.S.C. §1446, under Cause No. NA 95-198-C-B/H, which was dismissed on November 9, 1995.

Sweeney's murder trial commenced on November 14, 1995. The jury returned its verdict of guilty on November 21, 1995. Sweeney was sentenced on December 20, 1995. The Indiana Supreme Court affirmed Sweeney's conviction and sentence in *Sweeney v. State*, 704 N.E.2d 86 (Ind. 1998), *cert. denied*, 527 U.S. 1035 (1999). The sentence imposed for his conviction for murder, which is the conviction challenged in this action, will be served upon completion of the executed portion of the federal sentence.

B.

Sweeney's habeas claims advanced here are as follows: (1) his Fifth Amendment rights against self-incrimination were violated when a statement was taken in custodial interrogation without his first receiving the *Miranda* warning that any statement could be used against him; (2) his Fifth Amendment right against self-incrimination and right to counsel were violated when he

was given incorrect advice by counsel that his statements could not be used against him; and (3) his statement was not given voluntarily, because he was not forewarned that his statement could be used against him and because counsel erroneously advised him that his statement could not be used against him.

III.

A.

Sweeney's habeas claims are variations on a single there, to-wit: he was not *Mirandized* before giving his statement to federal agents on June 30, 1992, and thus the statements were not voluntarily made and should not have been admitted into evidence and the evidence obtained from those statements, including the locating of Guthrie's body, should not have been admitted. This becomes, as the Indiana Supreme Court noted, *Sweeney vs. State*, 704 N.E.2d at 103, Sweeney's claim that the trial court erred in its November 10, 1994, ruling denying Sweeney's motion to suppress, and presents the most recent chapter in the decade-long quest by Sweeney to defeat the charge and later his conviction for the murder of Daniel Guthrie. Only §2254(d) is implicated here, because Sweeney does not challenge the state court's adjudication on the grounds that it is based "on an unreasonable determination of the facts," as contemplated by 28 U.S.C. §2254(d)(2). Nor does there appear to be a basis for such a §2254(d)(2) challenge here, despite the contention that an agreement for use immunity had been reached between the Prosecutor of Clark County and Sweeney and his attorneys regarding information expected to be supplied by Sweeney during the debriefing of June 30, 1992, because state court factual finding are presumed to be correct unless the petitioner rebuts the

presumption with "clear and convincing" evidence. *Id.* No such factual rebuttal has been made here, so we indulge the presumption.

On direct appeal, the Indiana Supreme Court recited the relevant facts of the case as follows:

> The federal officials offered defendant a plea agreement whereby they would recommend a sentence reduction if defendant would provide the federal officials with certain kinds of information, the most relevant to this case being the location of Danny Guthrie's body. After this proposal was made, defendant's attorneys telephoned the Clark County prosecutor to advise the prosecutor of the agreement which had been offered by the federal officials, and asked if the prosecutor would give the defendant "use immunity" for any statements which were provided. What happened next is disputed. Defense counsel testified that, based on the fifteen minute telephone conversation, it was absolutely clear that a use immunity agreement existed. One of the defense attorneys advised defendant that any statements he made regarding the whereabouts of Guthrie's body could not be used against him in a criminal prosecution. Defendant then provided federal officials and a Clark County detective with his recollection of the events leading up to Guthrie's death. *Sweeney*, 704 N.E.2d at 103-104.

B.

We address the first question in light of the analysis required by §2254(d)(1): whether the decision of the Indiana Supreme Court was contrary to clearly established Federal

law as determined by the Supreme Court of the United States.

The "contrary to" standard requires a state court decision to be "substantially different from the relevant precedent of [the Supreme Court]." *Williams*, 529 U.S. at 405, 120 S. Ct. 1495 (concurring opinion of Justice O'Connor). For example, a state court decision applying a rule that contradicts the governing law set forth by the Supreme Court would qualify as "contrary to," as would a decision that involves a set of facts materially indistinguishable from a Supreme Court case that arrives at a different result. *Id.* at 405-406, 120 S. Ct. 1495. By contrast, a state court decision that draws from Supreme Court precedent the correct legal rule and applies it in a factually distinguishable situation will not satisfy the "contrary to" standard, no matter how misguided the decision's ultimate conclusion. *Id.* at 406-407, 120 S. Ct. 1495.

The Fifth Amendment to the Constitution guarantees that no person "shall be compelled in any criminal case to be a witness against himself." This guarantee is generally known as the Fifth Amendment privilege against compelled self-incrimination. This privilege is protected against abrogation by the States through the Fourteenth Amendment. *See Malloy v. Hogan*, 378 U.S. 1, 5, 84 S. Ct. 1489, 1492 (1964). As a necessary and integral component of the privilege against self-incrimination , the Supreme Court recognized in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966), that during custodial interrogation, "the right to have counsel present... is indispensable to the protection of the Fifth Amendment privilege." *Id.* at 469, 86 S. Ct. at 1625.

The Miranda warnings as such are not constitutionally protected rights, but rather they are a means

to insure protection of the right against self-incrimination. *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989). The purpose of this prophylactic rule is to counter the inherently coercive effect of custodial interrogations. *Miranda*, 384 U.S. at 467, 86 S. Ct. at 1624; *see also Arizona v. Mauro*, 481 U.S. 520, 529-530 107 S. Ct. 1931, 1937 (1987) (noting that purpose behind Miranda was "preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment").

In order for Sweeney to prevail in his principal claim under the "contrary to" prong of § 2254(d)(1), he must identify a decision in which the United States Supreme Court has held that statements made by, or information learned from, a person in a custodial setting, represented by counsel, could not thereafter be used by prosecuting authorities, even though neither the person's attorneys nor the interrogating officers had informed the person of the right to have counsel present before interrogation progressed. Because Sweeney has not identified such a decision, he cannot prevail under the "contrary to" prong, of § 2254(d)(1).

C.

This leaves for consideration the issue of whether the Indiana Supreme Court's decision "involved an unreasonable application" of *Miranda* and its Supreme Court progeny. 28 U.S. C. § 2254(d)(1). A state court decision will be deemed an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Williams*, 529 U.S. at 413, 120 S. Ct. at 1523.

> When faced with the task of determining whether a particular application of Supreme Court precedent is unreasonable, we have often taken a more pragmatic approach to answering the question, scrutinizing the practical operation and effect of the principles at issue in the particular facts of the case. See, e.g. *Miller v. Anderson*, 255 F.3d 455, 456-59 (7th Cir. 2001); *Redmond v. Kingston*, 240 F.3d 590, 591-92 (7th Cir. 2001); *Washington v. Smith*, 219 F.3d 620, 627-35 (7th Cir. 2000). We ask whether the decision is "at least minimally consistent with the facts and circumstances of the case" or "if it is one of several equally plausible outcomes," *Hennon v. Cooper*, 109 F.3d 330, 335, (7th Cir. 1997); *Hall v. Washington*, 106 F.3d 742, 749 (7th Cir. 1997), granting a writ of habeas corpus if the determination is "at such tension with governing U.S. Supreme Court precedents, or so inadequately supported by the record, or so arbitrary" as to be unreasonable. *Hall*, 106 F.3d at 749.

Boss v. Pierce, 263 F.3d 734, 741-42 (7th Cir. 2001).

The Indiana Supreme Court has held that although Sweeney was in federal custody and was not advised of his *Miranda* rights, "under the circumstances of this case, we find that it was unnecessary for defendant to be advised of his *Miranda* rights." *Sweeney*, 704 N.E.2d at 104. The court's reasoning was explicated as follows:

> In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966), the United States

> Supreme Court established several broad prophylactic rights in order to protect citizens interrogated while in custody. *See Allen v. State*, 686 N.E.2d 760, 769, (Ind. 1997). *Miranda* requires that defendants be advised of their right to an attorney, their right to remain silent, that their statements may be used against them in a court of law, and that the State will provide them with an attorney if they cannot afford one. *Allen*, 686 N.E.2d at 769. "The purpose of requiring Miranda warnings before custodial interrogation is to combat state-sanctioned coercion." *Id.* However, the warnings required by *Miranda* are "in the absence of a fully effective equivalent." *Miranda*, 384 U.S. at 444, 478, 86 S. Ct. 1602. *See Poulton v. State*, 666 N.E.2d 390, 392, (Ind. 1996). In this case, we believe that an equivalent to the advisement of *Miranda* rights existed. Defendant had two of his lawyers present when he provided the statements which he now wishes to suppress. Irrespective of the fact that the defense attorneys encouraged defendant to provide certain statements to federal authorities to solidify a plea agreement, certainly these attorneys advised defendant of his rights and protected defendant from being coerced by the State.

Id. at 104 (footnote omitted).

Was this decision an unreasonable application of *Miranda* and its progeny from the United States Supreme Court or was it at least minimally consistent with the facts and circumstances of the case or one of several equally plausible outcomes? The following considerations influence our analysis of Sweeney's statements to authorities on June 30, 1992:

- In its *Miranda* decision, the Supreme Court held that "[t]he warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant." 384 U.S. at 476, 86 S. Ct. at 1628. *See also Rhode Island v. Innis*, 446 U.S. 291, 297, 100 S. Ct. 1682, 1687 (1980) (referring to "the now familiar Miranda warnings... or their equivalent"). In *California v. Prysock*, 453 U.S. 355, 101 S. Ct. 2806 (1981) (per curiam), the Supreme Court stated that "the 'rigidity 'of *Miranda* [does not] exten[d] to the precise formulation of the warnings given a criminal defendant," and that "no talismanic incantation [is] required to satisfy it strictures." *Id.*, at 359, 101 S. Ct., at 2809. Thus, satisfaction of *Miranda*'s requirements does not turn on the precise formulation of warnings, but rather, on whether the "warnings reasonably 'convey to [a suspect] his rights.'" *Duckworth v. Eagan*, 492 U.S. 195, 203, 109 S. Ct. 2875, 2880 (1989) (quoting *Prysock*, 453 U.S. at 361, 101 S. Ct. at 2810).

- Thus, "a necessary element of compulsory self-incrimination is some kind of compulsion." *Hoffa v. United States*, 385 U.S. 293, 304, 87 S. Ct. 408, 414 (1966). *Miranda* forbids coercion, not strategic decisions such as whether and when to speak with authorities, and what information to relate if the decision to speak is made. "Coercion is determined from the perspective of the suspect." *Illinois v. Perkins*, 496 U.S. at 296, 110 S. Ct. 2394.

- As further recognized in *Miranda*: "[C]onfessions remain a proper element in law enforcement. Any

statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence." 384 U.S. at 478, 86 S. Ct. at 1629.

- The questions of a "waiver" of Sweeney's *Miranda* rights is not the relevant issue. Sweeney's right to counsel was entirely *effectuated* as his defense team negotiated a resolution of the federal charge and included in that arrangements for Sweeney to be questioned on June 30, 1992.

- Sweeney's representation by counsel before and during the interrogation of June 30, 1992, and notably the presence of both his attorneys during that entire session, was *ipso facto* the "fully effective equivalent" of Sweeney's having (1) been without counsel on that occasion, (2) been fully informed of his *Miranda* rights, and (3) knowingly waived his right to counsel before questioning proceeded. Because of the presence and active participation of Sweeney's counsel, and Sweeney's own participation as recommended by his attorney, the analysis of his statements extends beyond the *Miranda* warnings/waiver issue. *See United States vs. Washington*, 431 U.S. 181, 188, 97 S. Ct. 1814, 1819 (1977) ("Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled."). Sweeney invoked his right to counsel far in advance of the debriefing session of June 30, 1992, and the Indiana Supreme Court was entirely correct when it concluded that under the circumstances of this case, Sweeney's representation was the "fully effective equivalent" of *Miranda* warnings by the police. *Duckworth v. Eagan*, 492 U.S.

195, 203, 109 S. Ct. 2875, 2880 (1989) (explaining that satisfaction of Miranda does not turn on the precise formulation of the warnings, but rather, on whether the "warnings reasonably 'convey to [a suspect] his rights'") (quoting *California v. Prysock*, 453 U.S. 355, 361, 101 S. Ct. 2806, 2810 (1981)).

- To the extent that Sweeney was mislead concerning the use (or non-use) of statements he made during the debriefing of June 30, 1992, the advice nonetheless came from his attorneys. Sweeney's decision to supply information to authorities on June 30, 1992, cannot be construed as coerced in any sense. *Miranda* does not require that suspects make decisions which are ultimately in their best interests, nor does it prohibit decisions simply because they are difficult, nor that the decisions to provide information are strategically correct.

Sweeney's Fifth Amendment *Miranda* claim thus fails to support the issuance of writ of habeas corpus, under the "reasonable application" prong of a § 2254(d)(1) analysis.

D.

Sweeney also contends that his statements to authorities on June 30, 1992, were not voluntary because he was mislead concerning the use for which the information he supplied could be made by the Clark County Prosecutor.

As with the *Miranda* claim discussed above, Sweeney has offered no controlling Supreme court decision in support of his claim of error regarding whether his statements on June 30, 1992, should have been excluded from evidence because they were not voluntarily made. He also does not

challenge the state court adjudication of this claim as having been based on an unreasonable determination of the facts. Accordingly, the pivotal question becomes whether the Indiana Supreme Court's resolution of the claim involved an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States. 28 U.S.C. §2254 (d)(1).

In *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S. Ct. 515, 521 (1986), the Supreme Court held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." The Supreme Court additionally held:

> There is obviously no reason to require more in the way of a "voluntariness" inquiry in the Miranda Waiver context than in the Fourteenth Amendment confession context. The sole concern of the Fifth Amendment, on which Miranda was based, is government coercion.... The voluntariness of a waiver of [the privilege against self-incrimination] has always depended on the absence of police overreaching, not on "free choice" in any broader sense of the word.

Connelly, 479 U.S. at 169-170, 107 S. Ct. at 523.

Factors that have been deemed relevant to a determination of voluntariness are the defendant's age, education, intelligence level, and mental state; the length of the defendant's detention; the nature of the interrogations; the inclusion of advice about constitutional rights; and the use of physical punishment, including deprivation of food or sleep. *See United States v. Brooks*, 125 F.3d 484, 492 (7th Cir.

1997). Here, there were no circumstances suggesting that Sweeney's statements on June 30, 1992, were the product of coercive police activity. To the contrary: Sweeney was in the driver's seat with respect to the information he was providing - - information which solidified his plea arrangements in federal court and which he believed would not be used as a basis for any criminal prosecution under Indiana state law with respect to Daniel Guthrie. A confession is voluntary "if the totality of the circumstances demonstrates that it was the product of rational intellect and not the result of physical abuse, psychological intimidation, or deceptive interrogation tactics calculated to overcome the defendant's free will." *Watson v. DeTella*, 122 F. 3d 450, 453 (7th Cir. 1997) (citations omitted). That is precisely the character of Sweeney's statements to interrogating officers on June 30, 1992.

It is true, of course, that "[a] false promise of lenience would be an example of forbidden tactics, for it would impede the suspect in making an informed choice as to whether he was better off confessing or clamming up," *United States v. Baldwin*, 60 F.3d 363, 365 (7th Cir, 1995), *vacated and remanded on other grounds*, 517 U.S. 1231, 116 S. Ct. 1873 (1996), and the same could be said of a false promise of use immunity. But the trial court found in its ruling of November 10, 1994, that there was a "misunderstanding" concerning the existence of an agreement for use immunity, and this finding of a "misunderstanding" is inconsistent with Sweeney's argument that his incriminating statements were involuntary because of deception by the State of Indiana. Sweeney's *belief* that a use immunity agreement had been reached does not establish that such an agreement was in fact reached, and the state court's findings reflect the opposite. Sweeney's statements on June 30, 1992, thus were not involuntary, and the Indiana Supreme Court's finding

that Sweeney's statements were not the product of coercion by police, *Sweeney v. State*, 704 N.E.2d at 104, was not an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States. Sweeney's claim of involuntariness rests on the alleged misinformation he received from his attorneys, but that misinformation, even if true, does not satisfy the constitutional test because it was not part of or the result of coercive police activity.

E.

To the extent Sweeney asserts an ineffective assistance of counsel claim, it arises under the Sixth Amendment to the Constitution. The Indiana Supreme Court considered Sweeney's claim that he had been denied effective assistance of counsel. The court, properly in our view, rejected this claim because at the time Sweeney provided statements to the authorities regarding the location of Guthrie's body, no state charges had been filed for the murder of Guthrie. The Indiana Supreme Court relied on *United States v. MacDonald*, 966 F.2d 854, 859, n.9 (4th Cir. 1992), for the proposition that if no Sixth Amendment right to counsel attaches to a proceeding, no ineffective assistance claim can be sustained. *MacDonald*, in turn, relied on *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), for the principle that prisoners have no right to counsel in a collateral proceeding. This reasoning was not contrary to established federal law, nor was it an unreasonable application thereof; the Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings, *see United States v. Gouveia*, 467 U.S. 180, 188, 104 S. Ct. 2292, 2297 (1984), and before proceedings are initiated, a suspect in a criminal investigation has no right under the Sixth Amendment to the assistance of counsel.

The Supreme Court has explained that "counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation," *Coleman v. Thompson*, 501 U.S. at 755, 111 S. Ct. at 2552, so there could be no ineffectiveness of counsel argument predicated on the performance of counsel at a time when the Sixth Amendment right to counsel was not in effect. *Montgomery v. Meloy*, 90 F.3d 1200, 1206, (7th Cir.), *cert. denied*, 117 S. Ct. 266 (1996). We will not reverse the Indiana Supreme Court's reasonable application of United States Supreme Court precedent with regard to ineffective assistance of counsel claims.

IV.

A §2254 claim must allege a "fundamental defect which inherently results in a complete miscarriage of justice (or) an omission inconsistent with the rudimentary demands of fair procedure." *DeBerry v. Wolff*, 513 F.2d 1336, 1338, (8th Cir. 1975) (citing *Hill v. United States*, 368 U.S. 424, 428 (1962)). "A defendant whose position depends on anything other than a straightforward application of established rules cannot obtain a writ of habeas corpus." *Liegakos v. Cooke*, 106 F.3d 1381, 1388 (7th Cir. 1997). Sweeney has not succeeded in making the requisite showing in this case. Accordingly, his petition for a writ of habeas corpus is **DENIED** and this action is dismissed with prejudice. Judgment consistent with this Entry shall now issue.

IT IS SO ORDERED.

/s/ Sarah Evans Barker
SARAH EVANS BARKER
Judge, United States District Court

Date: February 27, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

CHARLES SWEENEY, JR., PETITIONER	)	
VS.	)	NO. NA 00-72-C-B/S
STEVE CARTER, RESPONDENT	)	

ENTRY

The petitioner's motion to reconsider filed on March 8, 2002, was filed within ten (10) working days from the entry of judgment on the clerk's docket on February 27, 2002.

Rule 59(e) "authorizes relief when a moving party 'clearly establish[es] either a manifest error of law or fact' or 'present[s] newly discovered evidence.'" *Souter v. International Union*, 993 F.2d 595, 599 (7th Cir. 1993) (quoting *Federal Deposit Ins. Corp. v Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986)). There was in this case no manifest error of law of fact. *See Russell v. Delco Remy Div. of General Motor Corp.*, 51 F.3d 746, 749 (7th Cir. 1995). The court did not misapprehend the petitioner's claims, nor did it misapply the law to those claims. The petitioner's focus on whether his statement to interrogating officials was voluntary is unavailing because, as noted in the court's decision, "there were no circumstances suggesting that Sweeney's statements on June 30, 1992, were the product of coercive police activity." The petitioner's post-judgment motion also suggests that the court failed to make a correct *Fifth Amendment* analysis of the petitioner's right to counsel during his interrogation. Hardly. The interrogation was a scheduled event, an

important part in a carefully orchestrated program to extricate the petitioner from the extreme edges of the criminal activity which had produced the federal prosecution. And far from being deprived counsel in this setting, the petitioner was accompanied by and assisted by his two attorneys, fully aware of the circumstances. His attorneys guided him through the interview. His subsequent regret over the use of the information he supplied does not render his statements involuntary, and certainly does not indicate that authorities deprived him of his Fifth Amendment right to counsel before or during the interrogation.

For these reasons, therefore, the petitioner's motion to alter or amend judgment is **denied**.

IT IS SO ORDERED.

/s/ Sarah Evans Barker
SARAH EVANS BARKER
Judge, United States District Court

Date: April 4, 2002

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 30, 2002

Before

HON. DIANE P. WOOD, *Circuit Judge*

NO. 02-2165

CHARLES E. SWEENEY, JR.,
Petitioner-Appellant,

VS.

STEVE CARTER,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, New Albany Division

No. NA 00-72-C-B/S

Sarah Evans Barker,
Judge

ORDER

Charles Sweeney has filed a notice of appeal from the denial of his petition under 28 U.S. C. §2254, which we construe as an application for certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find that Sweeney has made a

substantial showing of the denial of a constitutional right as to the following issue:

Whether Sweeney's counsel provided ineffective assistance when erroneously advising him that he had "use immunity" and that he should cooperate with the government and give a complete statement regarding the murder of Daniel Guthrie.

See McNeil v. Wisconsin, 501 U.S. 171 (1991); *Strickland v. Washington*, 466 U.S. 668 (1984); *see also* 28 U.S.C. §2553(c)(2).

Accordingly, the request for a certificate of appealability is GRANTED. Finally we appoint counsel to file an amicus brief for this appeal. A separate order will issue naming counsel and setting a briefing schedule.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 3, 2002

Before

HON. MICHAEL S. KANNE, *Circuit Judge*

HON. DIANE P. WOOD, *Circuit Judge*

NO. 02-2165

CHARLES E. SWEENEY, JR.,
Petitioner-Appellant,

Motion for
Reconsideration

v.

STEVE CARTER,
Respondent-Appellee.

ORDER

Charles Sweeney's motion for reconsideration of this court's August 30, 2002, order granting a certificate of appealability on only one of his claims is DENIED. We also DENY Sweeney's request to hold his motion for reconsideration in abeyance.